SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1427

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

RALPH WELLS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAMUEL J. COHEN
Attorney for Petitioner
605 Third Avenue
New York, New York 10016
Tel. No. (212) 682-6077

Of Counsel:

COHEN, WEISS AND SIMON
ROBERT S. SAVELSON
MICHAEL E. ABRAM

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In the

Supreme Court of the United States

October Term, 1975

No. .....

Air Line Pilots Association, International,

Petitioner,

—against—

Ralph Wells, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Air Line Pilots Association, International ("ALPA") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 6, 1975, rehearing of which was denied on January 8, 1976.

Opinions Below

The opinion of Arbitrator Harry Platt for the Southern Airways, Inc. Pilots' System Board of Adjustment is set out in the Appendix to this petition, pp. 1a-24a. The unreported findings of fact and conclusions of law of the U.S. District Court for the Northern District of Georgia, Hon. Charles A. Moye, Jr., U.S.D.J., are printed at App. 26a-31a. The *per curiam* reversal by the United States Court of Appeals for the Fifth Circuit (Thornberry, Simpson and Roney, C.J.J.) is reported at 517 F.2d 132 and

set out at App. 32a-35a. The opinion of the Court of Appeals denying in part Ralph Wells' petition for rehearing and remanding to the District Court is reported at 522 F.2d 707 and set out at App. 37a-38a. The unreported order of the Court of Appeals, dated January 8, 1976, denying ALPA's petition for rehearing of the remand order is reproduced at App. 39a.

Jurisdiction

The decision of the Court of Appeals remanding this case for further proceedings in the District Court on Respondent Ralph Wells' claim of a breach of the duty of fair representation was entered on November 6, 1975. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* of petitioner Air Line Pilots Association, International with respect to the Court's November 6 order was entered on January 8, 1976. This Court has jurisdiction to review the remand judgment under 45 U.S.C. §§153(q) and 204, and 28 U.S.C. §1254(1). Jurisdiction in the District Court was predicated upon 28 U.S.C. §§1331 and 1337.

Question Presented

In a lawsuit under the Railway Labor Act by a discharged airline pilot, seeking to set aside the award of the Pilots' System Board of Adjustment which sustained the discharge as being for just cause, and for reinstatement and damages on the claim that the discharge was the result of alleged hostile collusion between the carrier and labor organization in breach of the duty of fair representation, did the Court of Appeals commit clear error in conflict with Supreme Court and other judicial authority by remanding the cause to the District Court for

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proceedings on the claim of wrongful discharge rather than dismissing the complaint, notwithstanding that a) the grievant voluntarily elected to submit to the System Board the very claims and issues on alleged wrongful discharge which he seeks to advance in District Court upon remand; b) the Court of Appeals refused to set aside the System Board award which resolved those claims against the grievant and held that the award was final and binding as the product of a fair hearing; and c) the grievant previously agreed that a decision which sustained the Board award was a bar to any further claims in the complaint?

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (the "Act"), 45 U.S.C. §151 *et seq.*, are set out at App. 40a-41a.

Statement of the Case

a. *Background*

In the aspect considered by this petition,* the Court of Appeals proceedings present for review a sharp new challenge to the Federal labor policies sustaining the final and binding character of the awards of labor arbitration tribunals. The net effect of the proceedings below is to allow an unsuccessful grievant under the Railway Labor Act to relitigate the merits of his discharge in Federal Court although the adverse arbitral award was sustained by the Court as the product of a full and fair hearing on all issues. The Court held in effect that the grievant may

* Respondent Ralph Wells filed a petition for a writ of certiorari to review another aspect of the Court of Appeals decisions. No. 75-6081. Briefs in opposition were filed.

secure relitigation by advancing the claim that his discharge was the product of hostile collusion or breach of the duty of fair representation, by the union and carrier, notwithstanding that these very issues were voluntarily tried to the System Board of Adjustment and rejected in a decision which the Court held was final and binding in accordance with its terms.

b. *Parties*

Petitioner Air Line Pilots Association, International ("ALPA") is the pilot-representing organization under the Railway Labor Act on almost all U.S. certified carriers, including Respondent Southern Airways, Inc. ("Southern"). Respondent Ralph Wells is a former airline pilot who was discharged by Southern in 1969 on grounds of pilot incompetence. (App. 32a).

c. *System Board proceedings*

Following his discharge Wells elected to file a grievance (App. 33a) through the Southern Pilots' System Board of Adjustment ("System Board" or "Board"), established by the ALPA-Southern collective bargaining agreement pursuant to requirement of the Railway Labor Act, 45 U.S.C. §204 (App. 41a). Under the pilot contract, System Board awards are final and binding (App. 7a).

On Wells' hearing, the Board consisted of professional labor Arbitrator Harry Platt as presiding arbitrator together with two pilot and two management members. Wells at his election was represented by his own counsel. (App. 35a, n.5). In the hearing, Wells took the position that his discharge was the result of his employment as a replacement pilot on Southern during a 1960-1962 pilot strike, and Southern-ALPA collusion to have him discharged because of his role at that time, rather than sub-

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standard pilot competence. Wells' counsel objected to the composition of the Board in his hearing, but made no other objection to the Board's capacity to resolve the issues on the merits. Wells and Southern then stipulated that the hearing would proceed subject only to Wells' reservation of a right to test the Board composition in a later Court proceeding, without reservation of other rights. Wells then voluntarily submitted evidence on all discharge issues, including his claims of hostile collusion between ALPA and Southern and of competence as a pilot.

d. *System Board Award*

Following the three-day Board hearing, Arbitrator Platt issued an opinion (App. 1a-24a) in which he rejected all claims that the discharge was the result of any hostility or collusion on the part of Southern or ALPA and found that Wells was properly terminated for just cause in terms of competence as a pilot. (App. 22a-24a). With respect to collusion issues Arbitrator Platt noted, "Assumption is no substitute for reasonable probability as a measure of wrongdoing" (App. 23a), adding that "no one, except the aggrieved, seems seriously to believe that the relations between ALPA members and non-ALPA members have been so poor in recent years as to make a conspiracy to bring about Wells' discharge a reasonable probability." (*Id.*) On issues of pilot competence, the Arbitrator stated, in part,

> "A pilot entrusted with the lives of numerous passengers may surely be expected to attain and maintain a reasonable degree of proficiency and to exhibit competence in his flying, demonstrate sound judgment and utilize equipment to the safe and successful completion of his flight. What is not expected of such a pilot are displays of periodic deficiencies in judgment,

repeated lack of knowledge, and continued marginal or substandard proficiency. Wells' record shows not only a tendency to deviate from standard flight procedures but a lack of knowledge of those procedures." (App. 22a).

e. *District Court Proceedings*

Wells next brought this action in the U.S. District Court, Atlanta, to set aside the Platt award and for reinstatement, backpay and damages, claiming that he was denied due process in the Board proceeding, and that his discharge was the product of hostile collusion between Southern and ALPA. In the District Court, Wells took the position that he could not recover on the claims of hostile collusion and wrongful discharge unless the Platt award were first set aside as the product of an unfair hearing; this position was unchanged at any point until after the initial opinion of the Court of Appeals.* The District Court found that Wells was denied due process, set aside the Platt award, ordered the grievance remanded to a new System Board or other arbitration proceeding, and deferred decision on any other claims pending the new arbitration. (App. 31a).

f. *Court of Appeals Proceedings*

On appeals by Southern and ALPA the Court of Appeals reversed, finding that Wells received a full and fair

* For example, the District Judge stated at trial without objection by Wells, "[A]s I see it, if the System Board award stands, that's the end of the matter. So before you can go further you have to get past that hurdle." (Transcript of trial, p. 80). In his post-trial brief, Wells stated, "If there had been a proper proceeding before the system board leading to a valid award, that award would be an obstacle to plaintiff's action for wrongful discharge. * * * For plaintiff to get relief under either count, it is necessary that the award of the system board be overturned."

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Board hearing and decision, including due process and representation by his own counsel as he elected, creating a final and binding award as provided in the pilot contract. The Court stated in part:

> "Wells received a full hearing before the Board. He had full opportunity to present his claim that he was not discharged for incompetence, but for hostile discrimination against nonunion pilots by the ALPA, and company acquiescence in that discrimination. The Board resolved this claim adversely to Wells." (App. 35a).

Wells then petitioned for rehearing. In his petition, he claimed for the first time in either the District Court or Court of Appeals that he was entitled to press his claim for breach of the duty of fair representation—the contention that his discharge was the product of hostile collusion—notwithstanding the final and binding System Board award. The Court of Appeals denied Wells' petition in part, refusing to disturb its position that the Platt award was final and binding. Notwithstanding, it remanded the case to the District Court for further proceedings on Wells' claim that there was a breach of the duty of fair representation. (App. 38a). The sole authority for this action cited by the Court was *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), although this case only holds that an employee is not required to exhaust adjustment board remedies under certain circumstances before filing a fair representation suit. The Court denied ALPA's subsequent petition for rehearing. (App. 39a).

g. *Supreme Court Proceedings*

Wells has petitioned for a writ of certiorari to review the holding that he was not denied due process or a fair proceeding in the System Board, and that he is bound by

the Board award; ALPA and Southern have filed briefs in opposition. No. 75-6081. The present petition seeks review only of the order which remands the case for consideration of Wells' claim of alleged breach of the duty of fair representation. It is on this one aspect of the case that the Court of Appeals' decision requires review. The Court's remand order directly conflicts with the recent decision of the Supreme Court in *Hines* v. *Anchor Motor Freight, Inc.*, —— U.S. ——, 91 LRRM 2481 (No. 74-1025, March 3, 1976). There this Court reaffirmed the principles of finality in labor arbitration proceedings and clarified the limits of the exceptions to finality. The Court held in accordance with the prevailing lower Court decisions (91 LRRM 2481, 2487, n.11), that the grievant dissatisfied by an arbitral award is not bound by "the contractual protection against relitigating an arbitral decision" where he successfully asserts "that the process has fundamentally malfunctioned by reason of the bad faith performance of the Union." 91 LRRM 2481, 2487. In that case the employee may join the union and employer as defendants; neither defendant may rely on the arbitral award as a bar to recovery. Just as clearly, the *Hines* decision marks the boundaries for bypassing the award in this type of case; it contemplates that where the arbitration has not malfunctioned by reason of the union's action or any other denial of due process the grievant is bound by the contractual finality of the award.

The same principle was clear in *Humphrey* v. *Moore*, 375 U.S. 335 (1964), where the Court held that an unsuccessful arbitration grievant could not set aside the award where he was not denied a fair hearing or fair representation in the arbitration itself. The principles of finality in the absence of proof within the narrow exceptions are even stronger in the present case than in *Hines* or *Humphrey*, since the Platt award was rendered by a professional arbi-

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trator on the System Board, an administrative tribunal established by statutory requirement, in contrast to the contractual bipartite proceedings in *Hines* and *Humphrey*.

Since the essence of Wells' claim which he voluntarily submitted to Arbitrator Platt for decision is precisely the same as any claim for improper discharge which he might seek to advance in the District Court upon remand, and since the Court of Appeals held that Wells received a full and fair hearing and decision on this claim before Arbitrator Platt, there is nothing left for Wells to litigate on remand in connection with his discharge. The Court of Appeals' remand order creates a wholly novel exception to the principle of finality, to the effect that the grievant may relitigate the merits of the grievance in Court by asserting that his discharge or other grievance claim was the product of the Union's breach of the duty of fair representation, notwithstanding that the Board award was upheld as a fair, final and binding decision on the same issues. Little remains of the finality principles following the disposition below. For this and other reasons to be presented, ALPA urges review of the Court's remand order.

Reasons for Granting the Writ

1. *The Court of Appeals' Disposition on Wells' Petition for Rehearing Is in Conflict With Applicable Decisions of This Court and the Courts of Appeals*

The Court of Appeals ordered this case remanded to the District Court for consideration of the claim of denial of fair representation solely on the authority of *Czosek* v. *O'Mara*, 397 U.S. 25 (1970). The Court read *Czosek* as holding that "a claim for the breach of the duty of fair representation is separate and distinct from plaintiff-appellee Wells' claim that the System Board procedure denied

him due process." (App. 38a). Contrary to the Court, *Czosek* v. *O'Mara* does not hold that an employee has the right to proceed against either the union or carrier after voluntary litigation on the same facts and issues in a full and fair System Board proceeding where there was no denial of due process or fair representation. *Czosek*, like prior Supreme Court decisions, only held that an employee is not required to exhaust adjustment board remedies under certain circumstances before filing a fair representation suit. For prior Supreme Court decisions see *Conley* v. *Gibson*, 355 U.S. 41 (1967); *Glover* v. *St. Louis-S.F.R.R. Co.*, 393 U.S. 324 (1969). For example, in *Glover*, the Court held that railroad employees could bring suit against the union and carrier for hostile collusion without exhausting the adjustment board remedy against the carrier if plaintiff could show that "a formal effort to pursue contractual or administrative remedies would be absolutely futile." 393 U.S. at 391. In *Czosek, supra*, applying the *Glover* principle, the Court only held that the union could be sued for breach of the duty of fair representation without exhausting adjustment board remedies where it was charged that the union had arbitrarily refused to process plaintiffs' claims through the adjustment board. Nothing in *Czosek* can be read as permitting further proceedings on a fair representation claim where the employee, with his own counsel, voluntarily litigated, sought and obtained a decision on the same collusion issues before a neutral arbitrator, with no denial of due process. This is particularly so where there was full acceptance of the award as a bar to further proceedings in the absence of denial of due process.

In contrast to *Czosek*, both *Humphrey* v. *Moore, supra*, and *Hines* v. *Anchor Motor Freight, Inc., supra*, deal explicitly with the binding character of arbitral awards actually rendered. As previously discussed, in *Humphrey*

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and *Hines* this Court has established that the grievant's right to proceed against his union or employer in this type of case after litigation on the same facts and issues in the arbitration, depends on establishing that he was denied due process or fair representation in connection with the arbitration. Otherwise, in the Court's words in *Humphrey*, "The decision of the [arbitration tribunal], reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." 375 U.S. 335, 351. The Court of Appeals held that Wells received a full and fair hearing and decision on his claim of improper discharge in the System Board, including full hearing on the merits of the collusion issue. Wells has not "proved his case" (*id.*, 375 U.S. 335, 351) that he was denied due process and fair representation in the Board, and his complaint should therefore have been dismissed in its entirety.

The Court's disposition on Wells' petition for rehearing conflicts with prevailing decisions in the Courts of Appeals. For example, in *Steinman* v. *Spector Freight System, Inc.*, 441 F.2d 599 (2d Cir. 1971), *cited* in *Hines, supra*, 91 LRRM 2481, 2487, n.11, plaintiff lost in the arbitration, then sued his union and employer, alleging unfair representation in the grievance proceeding and breach of contract. The Court of Appeals reversed dismissal of the complaint, holding that the arbitration award was not a bar to suit or the same issues because plaintiff was denied a fair hearing in the arbitration. 441 F.2d 599, 603. At the same time the Court pointed out that under *Humphrey* v. *Moore, supra* and other decisions, "plaintiff could not sue if he lost in a fair arbitration." 441 F.2d 599, 603.

In *Margetta* v. *Pam Pam Corp.*, 501 F.2d 179, 180, (9th Cir. 1974), cited in *Hines* at 91 LRRM 2488, the Court stated that " an employee may not attack a final arbitration

decision '. . . except on the grounds of fraud, deceit or *breach of the duty of fair representation* unless the grievance was a "sham, substantially inadequate or substantially unavailable."'" (Emphasis in original). The same principle appeared to obtain in the Fifth Circuit prior to the disposition here. See, *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971), *cited* in *Hines, supra*, 91 LRRM 2481, 2488, n.11 and *quoted* in *Margetta* v. *Pam Pam Corp., supra*, 501 F.2d 179, 180. See also other cases cited in *Hines, supra*, 91 LRRM 2481, 2487-88, n.11. This Court should exercise its jurisdiction to eliminate the conflict between the circuits and to restore the applicable Fifth Circuit principles to their former uniformity with the decisions of this Court and the other Courts of Appeals.

2. *Respondent's Election of Remedies and Agreement That the System Board Award Was a Bar to Further Relief*

The remand order of the Court below is a departure from the accepted course of judicial proceedings, which precludes the assertion of a new ground for relief following explicit election of remedies and waiver of the right to proceed in Federal Court on any claim following lack of success on the basis submitted.

Wells "elected to challenge his discharge through the grievance procedure. . . ." (App. 33a) rather than through the Courts.* In the System Board the only objection made

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* At the time of Wells' discharge there was available a cause of action for damages based upon claims of unlawful discharge. See *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953), since *overruled* in *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972). Wells might also have elected to commence, as an alternative to the System Board, a suit alleging carrier-union conspiracy resulting in his discharge. *Glover* v. *St. Louis S.F.Ry.*, 393 U.S. 324 (1969); *Richardson* v. *Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957).

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by Wells' counsel to the proceeding was over the composition of the Board. Respondents Wells and Southern stipulated that the hearing would proceed subject *only* to Wells' reservation of a right to test the Board composition in a later Court proceeding. Wells voluntarily tried all issues surrounding his discharge on the basis of that stipulation. Throughout the District Court proceeding Wells recognized that the System Board award, if sustained, is an absolute bar to any further claims. This position was unchanged in the Court of Appeals—until that Court sustained the award. Wells then asserted for the first time that he wished to pursue additional claims notwithstanding the final and binding Board award.

The Court of Appeals improperly ignored Wells' voluntary election of remedies and waiver of a right to Federal Court trial on all issues involving the merits of his discharge if the System Board award was sustained. This action was a departure from the accepted course of judicial proceedings which should be corrected in this Court.

CONCLUSION

The Court of Appeals' decision to remand this case for further proceedings is a serious erosion of the principles of finality in System Board proceedings under the Railway Labor Act, as indeed in labor arbitration generally. For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the remand decision, and that, upon review, the Supreme Court order the complaint herein dismissed in its entirety.

Respectfully submitted,

SAMUEL J. COHEN
Attorney for Petitioner
605 Third Avenue
New York, New York 10016
Tel. No. (212) 682-6077

Of Counsel:

COHEN, WEISS AND SIMON
ROBERT S. SAVELSON
MICHAEL E. ABRAM